

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

November 28, 2000

GSBCA 15343-RELO

In the Matter of LARRY D. GATEWOOD

Larry D. Gatewood, King George, VA, Claimant.

Marguerite O. Dineen, Assistant Counsel, Naval Surface Warfare Center, Dahlgren Division, Department of the Navy, Dahlgren, VA, appearing for Department of the Navy.

GOODMAN, Board Judge.

Claimant, Larry D. Gatewood, is a civilian employee of the Department of the Navy. He requested reimbursement of certain real estate expenses incurred in the sale of his property and the agency denied reimbursement of a portion of the expenses. He has requested that this Board review the agency's decision.

Background

In September 1994, claimant purchased a one hundred acre farm in the rural Spice Valley section of Lawrence County, Indiana, approximately eight miles from new permanent duty station. Claimant states that he "did not purchase this farm for speculation or subdivision, but to serve as a place where I could raise my family and tend to a small amount of livestock." Claimant states further that he could have purchased a house on a one-half acre lot for the same price in a subdivision in Bloomington, Indiana, but preferred the solitude of living in the country and the enjoyment of raising livestock.

Claimant states that he was not a farmer and did not own farm equipment of any kind. He purchased the property because it was affordable and because he and his wife liked the house and its setting, and not with the intention of becoming farmers. After living on the property for a while, claimant and his wife decided to raise a few sheep and cows for personal enjoyment. He states further: "These animals were our country pets, along with our Labrador Retriever that also adapted well to the privacy and open spaces that this property provided."

In October 1998, claimant received travel orders for a permanent change of station (PCS) to Virginia. He sold his property in Indiana and submitted a claim for reimbursement of real estate expenses incurred in the sale of the property. The agency denied payment of a portion of his real estate expenses because claimant's property allegedly contained land in

excess of that which would reasonably relate to the residence site, and because he incurred costs that were not typically reimbursed to the seller.

The Agency's Determination

The agency determined that claimant was not entitled to reimbursement of all real estate expenses incurred. The agency determination read in relevant part:

[T]he property in question was determined to have been a dwelling and an agricultural farm consisting of about 100 acres. The excess acreage was rented to a local farmer for grazing of animals and harvesting of hay.

Section C14000(F)(2)(b) [of the Joint Travel Regulations (JTR)] provides that "The employee shall be limited to pro rata reimbursement when land in excess of that which reasonably relates to the residence site, is bought or sold." In light of this requirement, a determination had to be made on the pro rata reimbursement rate that needed to be applied to the non-excess acreage property. Decisions of the Comptroller General have provided guidance on what factors to consider, such as zoning or county assessment information, when conducting an apportionment of such property. Since the property in question is located in a rural portion of Lawrence County, Indiana, no zoning regulations are applicable. However, the Lawrence County Assessor Office provided the property assessment forms, and stated that local policy is to allocate one acre to a dwelling in determining how much land is applied to dwellings for assessment purposes

. . . [The] 1999 assessment for claimant's property in Lawrence County, Indiana was as follows:

Land - - - \$13,600, of which \$2900 was for the homesite. Deducting the homesite, assessment value of excess acreage is \$10,700.

Improvements (dwelling, garage, and farm buildings) - - - \$12,700. All buildings were included since claimant did not rent farm building and used them to store personal property, according to his wife.

Adding value of homesite (\$2900) to value of improvements (\$12,700) resulted in assessed valuation of residence totaling \$15,600. Residence plus excess land equals \$26,300. The ratio of residence to total property assessed valuation is 59.32%. Therefore, the pro rata reimbursement rate to be applied to the expenses claimed is 59.32%.

Claimant sold his property for \$188,760 and paid \$17,160 in brokerage fees, that equates to 9% of sale price. The usual and customary brokerage fee in the locality of Williams, Indiana for the sale of property is 7%. Therefore, brokerage fees are limited to \$13,213.20. Applying the pro rated ratio of 59.32% to the \$13,213.20, \$7838.07 is recommended for payment.

Claimant incurred \$1682.71 for legal and related expenses (survey, title and document preparation). Such expenses are reasonable and customarily incurred by a seller in the locality of Williams, Indiana. Applying the pro rated ratio of 59.32% to the \$1682.71, \$998.18 is recommended for payment. Claimant seeks \$150.00 for settlement or closing costs. It is the customary practice in the locality of Williams, Indiana, for this expense to be incurred by the buyer. Therefore, this amount is not recommended for payment. Additionally, claimant seeks \$100.00 for courier fees. However, no evidence was submitted supporting this expenses, nor was it noted on the HUD Settlement Statement Therefore, this expense is not recommended for payment.

Subject to the foregoing adjustments, total recommended for payment is \$8836.25.

Claimant's Request for Reimbursement

Claimant has asked this Board to review the agency's decision. He has noted that the agency reimbursed him in full for real estate expenses incurred in the purchase of his residence. He also states that he did not rent his land to a farmer for the raising of livestock or growing hay. He has requested reimbursement in the amount of \$6059.66, which equals the 40.68% of the brokerage fees and legal and related costs which were not reimbursed. He has also requested reimbursement of \$150 in closing costs and \$100 in courier fees which the agency did not reimburse.

With regard to the closing costs of \$150, claimant states:

I request reimbursement of \$150 closing fee paid to Ellison Abstract & Titles Inc. I discussed this charge with Mr. John Thomas of Ellison Abstracts and Title According to Mr. Thomas, the closing fee covered the costs for tracking down payoffs, seeing that disbursements were paid, recording the deed, paying off the mortgage, ensuring the that buyer has clear title to the property, and handling the overall activities performed by a settlement agent at closing. [The agency] stated that it was customary for this expense to be incurred by the buyer. However, Mr. Thomas informed me that this is the customary practice only when the buyer is using a loan to purchase the property. When the transaction is an all-cash deal with no loan involved, Mr. Thomas indicated that it is customary for either the buyer or the seller to pay the closing fee. For the subject property, [the purchaser] purchased the farm from me in an all-cash deal that involved no loan financing (as evidenced by the HUD Settlement Statement). Therefore, this expense should be reimbursable.

In response to the request for review, the agency has responded that it agrees with the prior assessment of reimbursement, except that it agrees with claimant that he is entitled to reimbursement of the \$100 courier fee.

Discussion

Brokerage Fees and Legal and Related Expenses

In providing for the reimbursement of expenses incurred in connection with residence transactions of federal employees, the JTR provide: "The employee shall be limited to pro rata reimbursement when he/she sells or purchases land in excess of that which reasonably relates to the residence site." JTR C14000-F.2.b.

In Frank A. Sterbenz, GSBCA 13662-RELO, 97-1 BCA ¶ 28,871, we applied this proration rule by determining how much land "reasonably relates to the residence site" and how much land is "in excess." As we stated in Sterbenz, "This determination should initially be made by the agency to which the claim is submitted based upon the prevailing and customary practices in the locality of the official duty station." Id. at 144,005.

The Comptroller General, in 54 Comp. Gen. 597 (1975), articulated guidelines to apply in determining the proper pro rata reimbursement, including examination of zoning laws, appraisal by experts, and consideration of the location and topography of the land as ways of establishing reasonableness of the property size being sold. The Comptroller General elaborated:

Absent any zoning laws or regulations for the building of residential dwellings or if the area is generally zoned for agricultural use and the sale or purchase involves a farm dwelling with appurtenant outbuildings, the [agency's] certifying officer should take into account such factors as the use to which the land has been put in the past, its present utilization and the potential for future use. That will include consideration of crop growing, standing timber, other income producing use, fencing, irrigation, etc. In cases of unimproved land which could be subdivided and sold as lots in the future, it is suggested that the officer take into account the size of the lots in other subdivisions in the area and the requirements of the local or State Department of Health which is usually concerned with the waste disposal systems and the percolation quality of the soils

. . . The valuation of the excess land for proration purposes would be the difference between the purchase or sale price less the valuation of the residence, the residence site and its appurtenant buildings.

54 Comp. Gen. at 598-99; accord Michael T. Matarrese, GSBCA 14769-RELO, 99-1 BCA ¶ 30,243 ; John A. Byrd, 54 Comp. Gen. 58 (1984); Daniel J. Totheroh, B-204046 (Aug. 27, 1981); Franklin J. Rindt, B-199900 (Feb. 10, 1981).

In the instant case, the agency made a determination that the claimant's property contained land in excess of that which reasonably relates to the residence site. This determination was made based upon the fact that the property was a farm and contained a house and land which was suitable for raising livestock. While claimant indicates that he did not raise livestock for commercial purposes, his actual use is not dispositive. In determining whether there is land in excess of what reasonably relates to the residence, the land's potential for income production, not the current owner's actual use, is a determinative factor. Monte W. Ausland, B-229368 (Sept. 20, 1988). That properties of similar market value may exist

in other neighborhoods which contain single family homes on less than half- acre lots does not diminish the income potential of claimant's property. Also, the fact that the agency reimbursed claimant for all of his costs when he initially purchased the property does not require the agency to do the same when claimant sells the property. The agency's determination that claimant's property contained land in excess of what reasonably relates to the residence was correct.

The record in the case contains evidence of the agency's valuation of the residence and the land reasonably related to the residential site in this case. The agency performed this valuation from tax assessment records. Tax assessment records are proper to use to determine the pro rata ratio. See Ausland. Once the agency obtains this valuation, it should prorate the appropriate reimbursable expenses accordingly. It should make reimbursement in the prorated amount unless it determines that the legal services in question would have been provided at a flat fee regardless of the proportion of the land which was associated with the residence. See Sterbenz. As the brokerage fee is a percentage of the sales price, it is presumed that this is not a flat rate charge. Accordingly, the agency's determination as to the pro rata reimbursement of the brokerage fees is correct.

Claimant was also reimbursed the pro rata charge for the \$1682.71 claimed for legal and related expenses. This amount is the sum of the survey (\$929.71), title insurance (\$718.00) and attorney's fees (\$35.00). There is no indication in the record as to whether these are flat rate charges. If any of these charges are flat rate charges, claimant should obtain appropriate letters indicating such and present these letters to the agency. The agency should evaluate the information provided and appropriately reimburse claimant. If claimant does not provide information within a reasonable period of time, the agency may make payment on the assumption that the charges were not made on a flat-rate basis.

Closing Costs

The agency denied reimbursement of \$150 in closing costs, stating that such costs are typically paid by the buyer. Claimant has submitted a statement from his settlement officer indicating that this is the customary practice only when the buyer is using a loan to purchase the property. Claimant states that when the transaction is an all-cash deal with no loan involved, as was the case in this instance, it is customary for either the buyer or the seller to pay the closing costs. Claimant's statement does not support his claim for reimbursement. Although claimant has established that it is negotiable as to which party to the transaction pays these costs, we cannot find that it is customary that such costs are paid by the seller, as suggested by claimant. The agency properly denied reimbursement of these costs.

Courier Fees

The agency has stated that it now believes claimant is entitled to reimbursement of courier fees in the amount of \$100. Since claimant was already living in Virginia at the time he sold his residence in Indiana, the agency acknowledges that it was necessary for claimant to use a courier to transmit the documentation. The agency has cited us to our decision in Ramiro Ramirez, GSBCA 14252, 98-1 BCA ¶ 29702, reconsideration denied, 98-2 BCA ¶ 29,797. In that case, we found that claimant was entitled to reimbursement of courier fees pursuant to JTR C14002-A.6 as incidental expenses because the incurrence of the fees was

necessary and not merely a convenience to claimant. In the instant case, where claimant was living at his new duty station at the time the settlement on his prior residence was accomplished, the courier fees may well have been necessary as incidental charges made for required services. If claimant can show that they were, the agency's determination to make payment is correct, and he should be reimbursed for these costs.

Decision

The agency's assessment of claimant's pro rata reimbursement of broker's fees is correct. If the legal and related expenses are flat fee services, claimant is entitled to reimbursement of these costs. Claimant is not entitled to reimbursement of \$150 closing costs. If the \$100 in courier fees was paid for required services, claimant should be reimbursed for these costs as well.

ALLAN H. GOODMAN
Board Judge